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IN THE

Supreme Court of the United States

October Term, 1960

No. 644

CHARLES W. PADGETT,
Petitioner,

vs.

BUXTON-SMITH MERCANTILE COMPANY
and FLOYD R. EHRMANN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROLANDO J. MATTEUCCI
Counsel for Petitioner
604 Simms Building
Albuquerque, New Mexico

EUGENE E. KLECAN
WILLIAM J. BINGHAM
712 Simms Building
Albuquerque, New Mexico
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on November 2, 1960, affirming the judgment of the United States District Court for the District of New Mexico.

OPINION BELOW

The opinion of the Tenth Circuit has not been reported, but is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Tenth Circuit was entered on November 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Can the jury commissioners legally or constitutionally delegate judicial power to so-called "key men", who are private individuals not under oath, to the extent that these "key men" are made the sole source of names for petit jurors?

Is the use of a secret, unofficial group to perform a vital function of government in violation of our concept of democracy? Is a citizen of New Mexico filing suit in the State Court, and having his case removed to the Federal Court, deprived of his rights by being forced before a jury whose membership was entirely selected by this secret, unofficial group?

Can the interrogation of a jury commissioner, key men, and members of panel be barred from judicial inquiry?

Can the jury commissioner in the Federal Court in New Mexico use a method whereby 810 jurors were systematically included and 2,700 jurors were systematically excluded from the jury wheel in a deliberate effort to secure occupational representation rather than true representation of the people of New Mexico? Does the above method apply an illegal token representation for the various occupational stratas since the numbers in the various stratas were never known nor considered?

Can the trial Court and the appellate Court deny the Challenge or at least not permit it to go forward for further interrogation of key men, jury commissioner and panel, when there is uncontradicted and unrebutted evidence of discrimination and where the jury panel is admittedly "suspect"?

Is it illegal or in violation of due process to clothe a secret, unofficial group furnishing all names of petit jurors, with immunity from disclosure and interrogation as to methods of selection, especially when there is evidence of discrimination?

Can the question of interrogation of key men and jury commissioner be raised directly to the Court by Motion and by request in open Court, which was directly acted upon by the trial Judge in the negative and where there was never any question in the trial Court both as to the proper presentation of the issue and its categorical disposition by the trial Judge?

Can the trial Judge, without violating due process of law, demand a non-evidentiary admission of exclusion by the jury commissioner before he will require him to testify?

Do the above questions involve a violation of due process of law or invoke this Court's supervisory control over its own inferior Court?

CONSTITUTIONAL

Provision involved: No person shall . . . be deprived of life, liberty or property without due process of law. U. S. CONST. amend V.

STATEMENT OF THE CASE

The plaintiff, Charles W. Padgett, originally sued a number of defendants in the State Court of New Mexico for personal injuries, asking damages in the amount of $85,050 (R.3). The citizenship of the defendants was adverse to the citizenship of the plaintiff and the amount involved exceeded the statutory amount, and the case was removed from the New Mexico State Court to the Federal District Court for the District of New Mexico (R.1). Subsequent to the denial of the Challenge and all Motions and Petitions in

support thereof filed by the plaintiff (R.5 - 19), trial on the merits was had in the Federal District Court and the jury returned a verdict for the defendants (R.29). This Petition concerns the denial of the Challenge and supplementary Petitions and Motions (R.48), which was affirmed by the Tenth Circuit Court of Appeals. Not only did the plaintiff offer evidence through two witnesses (R.33 - 45) but there was also received into evidence the matters contained in the Challenge and supplemental statements of facts (R.37, 6 - 37).

In his Challenge, plaintiff asked for remedies in the alternative, first that the jury panel and array be quashed, or that plaintiff be permitted to examine by deposition or otherwise those persons furnishing names of prospective jurors and to inquire into the means, methods and principles by which said names were selected, and that the clerk or jury commissioners be ordered to disclose the names of said persons who have submitted names of individuals to serve as petit jurors (R.11). Plaintiff made a Motion to interrogate the jury commissioners (R.18) and also made a separate Petition to examine the members of the panel which had been selected to try his case (R.16), for the purpose of showing any tendency towards economic discrimination. The trial Judge denied the Challenge and all relief requested therein, together with the Petition and Motion in support thereof (R.49).

The trial Judge would not permit the jury commissioner to be subpoenaed: "I won't require Mr. Mitchell to come into Court and be cross-examined as to his method. . . . I wouldn't subpoena him, no. . . . If you talked with him, and he told you, 'Yes, I did exclude certain classes of people,' I would then subpoena him." (R.50).

The clerk, as jury commissioner, was called as a witness and testified as to the methods of selecting the jury, which can be summarized as follows: (1) Selection by the jury commissioners of key men in each county in New Mexico according to population (R.38). Bernalillo County comprises approximately 25 per cent of the population and is the place wherein the Federal District Court is located. (2) Requests mailed by the jury commissioners to the

key men for lists of names to serve as petit jurors. (3) After receiving lists of names, then sending questionnaires to the persons on the lists submitted by the key men and to no others (R.43). (4) After receiving approximately 3,500 questionnaires, then the jury commissioners selected 810 names from the questionnaires and placed said 810 names in the jury wheel from which the panel to try the plaintiff's case was selected (R.39, 40, 42).

"Q. . . . is it true . . . all the names in the wheel, came about in this manner, that is, originally being submitted by so-called key men, as you define the term, from the various counties? A. Yes." (R.43). The jury commissioners had no idea at all as to how the key men selected the names that were submitted (R.43). The approximately 3,500 names, although the clerk was uncertain about this and said it could have been five or six or ten thousand (R.40), served as a pool upon which the jury commissioners made positive selections of the names that went into the jury wheel. This pool of names contained eligible jurors. The method by which the pool of names was formed by secret individuals, not under oath nor forming any part of the government, is questioned. The method of inclusion into the wheel, and exclusion therefrom, by the jury commissioners is likewise questioned, as well as the restrictions placed upon the litigation of the Challenge so as to reduce it in effect to a legal non-entity. The elimination of names in the pool and the selection of actual names to go into the wheel was done through an examination of all the questionnaires for the purpose of inserting individuals from every strata of society in New Mexico (R.46). No knowledge as to the number of individuals engaged in the various economic stratas of society was had or considered (R.46). Petitioner contended that this method of selection involved an intentional inclusion and exclusion of qualified jurors and worked a discrimination against the lower economic groups, since they were more numerous (R.7). The effect of the procedure was to have a representation by economic groups and an intentional and concerted effort to give to each economic strata of society a token representation (R.10, 11).

The names submitted by the key men in the various counties were a vital element in determining whether the jury was truly representative (R.8). This matter was expressly proposed by the Challenge (R.11) and in open Court: "I take it your Honor would deny that part of the Challenge which asks for the names of leading men in Bernalillo County? The Court: Yes, sir, that is denied, overruled." (R.50). The Court likewise denied the Motion to interrogate the actual members of the panel for the purpose of producing additional evidence about economic discrimination (R.49). All the facts stated in the Challenge and supplemental statement of facts were offered and received into evidence (R.37). The clerk was asked why the only two jurors from Valencia County, New Mexico, on the panel were bankers, for which the clerk had no explanation "except just drawing is by lot." (R.45).

The plaintiff in his Challenge set out facts, all admitted into evidence, showing economic discrimination in the main, but also including discrimination based upon national origins (R.7). Plaintiff, prior to injury, was a manual laborer working for wages. In his Challenge he gave a verified partial evaluation of the economic and social status of the members of the jury panel from Bernalillo County, New Mexico (R.6). Plaintiff alleged, which was admitted into evidence, that with the exception of one Byron L. McVicker, all of the jurors from Bernalillo County were in an executive or managerial position, or were the wives of persons who are owners or partial owners of substantial businesses located in Bernalillo County, New Mexico, and that as a result thereof the laboring class of Bernalillo County, New Mexico, is not properly represented on the panel and that those who work for hourly wages are nowhere represented in the Bernalillo County representatives on the panel (R.6). Plaintiff also set out certain information, verified, about certain jurors on the panel from other counties in New Mexico, showing that said individuals occupied a high economic and social position (R.8-10).

Plaintiff also alleged in his Challenge, which was admitted into

evidence, "That the representation of persons who themselves or their families own or operate a very large business, such as [illegible] grossly disproportionate to the representation of manual laborers below the rank of foreman." That of the fifty members of the panel drawn on March 1, 1960, only one person was in the category of manual laborer below the rank of foreman and he was a truck driver (R.10).

Plaintiff's evidence on discrimination was not disputed nor was it explained, and the trial Judge admitted that the panel might be suspect but stated, "It is just the accident of fate." (R.48). At the time of trial, which was seven days after the Challenge had been denied, the trial Court said that all the questionnaires of all the people in the jury wheel were available for examination (R.52). However, the incompleteness of the questionnaires is shown by the examination of juror Monico Mirabal who had stated in his questionnaire that he was in the ranching business (R.15). It was necessary for him to be expressly interrogated as to whether or not he was in the banking business and whether he was chairman of the board of a bank (R.53). This information had never appeared on his questionnaire (R.23).

An actual examination of the jurors would be necessary in many instances to ascertain their various occupations and economic status. The trial Judge denied the Motion to interrogate the actual members of the panel for the purpose of furnishing more definite information in this regard (R.49). The opinion from the Tenth Circuit (see appendix) states that an examination of all 810 questionnaires would have been decisive. Reference is made to the names and occupations in plaintiff's Exhibits (R.12-16) for incompleteness of information. For instance, Henry G. Hillson (R.14) is shown to be a businessman; in fact, he is a wholesale distributor engaged in an extensive wholesale business (R.6). Plaintiff had attached as an exhibit, which was introduced into evidence, names and occupations of jurors who had been a part of the panel in 1959, to show further evidence of discrimination over and above

the panel which had been selected to try his case (R.19-21). No evidence of any kind was offered disputing or rebutting plaintiff's evidence of discrimination. It is doubtful if time or economies would have permitted any such procedure, but in any event the information referred to by the Tenth Circuit had already been established as incomplete and even inaccurate, as in the case of Monico Mirabal's questionnaire (R.53).

The time factor was as follows: Plaintiff's case had been set down for trial on March 21, 1960, and in fact it was tried beginning on that date. Notice of Trial was received on March 3, 1960. On March 1, 1960, the names of fifty petit jurors were drawn to form the panel which would try the plaintiff's case, amongst others, on March 21, 1960. These jurors were to serve during the spring term. These jurors were set out in Exhibit I attached to the Jury Challenge (R.12-16). On March 8, 1960, eight additional Federal Court petit jurors were selected to serve during the spring term (R.26, 27), and on March 10, 1960, an additional eight jurors were drawn to serve during the spring term (R.27). These three drawings represented the panel from which the jury to try the plaintiff's case would be and was selected (R.28). Plaintiff's Challenge was categorically denied by the trial Judge on March 14, 1960 (R.51). In between Notice of Trial and denial of the Jury Challenge, eleven days elapsed. Only four days elapsed between the last drawing of jurors to decide plaintiff's case and the denial of the Challenge.

REASONS FOR ALLOWANCE OF THE WRIT

That the secret, private, key man jury system, as now approved by the Tenth Circuit, may invite imitation through the country.

That a system, whether state or federal, whereby the exercise of the civil right to be a juror depends entirely on a selection by another private individual, is of such national import as to merit the intervention of this Court in its supervision over the judiciary.

The opinion is in conflict with decisions of this Court.

That the status of citizens of New Mexico, both as litigants, and as jurors, is so directly involved as to merit a determination by this Court.

That the meaning of truly representative under our democracy is of national importance and is directly involved in the methods of the jury commissioners in arranging representation in the jury wheel based on occupational stratas of society.

ARGUMENT
AMPLIFYING THE REASONS STATED ABOVE

By showing the creation of an extra legal body, namely the key men, and the exclusive use of their submitted names and the enforced secrecy surrounding their identities and operations, together with the evidence submitted of economic discrimination, a prima facie case was established. The Supreme Court held in *Avery v. Georgia*, 345 U.S. 559, that a particular act of discrimination is not necessary. It is enough if the system (which involved different color tickets) made it easier for those to discriminate who are of a mind to discriminate when such a system shows discriminatory results. "The Court below affirmed, however, because petitioner had failed to prove some particular act of discrimination by some particular officer responsible for the selection of the jury; and the State now argues that it is petitioner's burden to fill this 'factual vacuum'. We cannot agree. If there is 'a vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the prima facie case of discrimination. We have held before and the Georgia Supreme Court itself recently followed these decisions, that when a prima facie case of discrimination is presented the burden falls forthwith upon the state to overcome it. The State failed to meet this test." *Avery v. Georgia*, supra.

The Court: "If you talked with him and he (Mr. Mitchell) told you 'Yes, I did exclude certain classes of people' I would then

subpoena him." It is patent that the decision of the learned trial Judge was based on a legal principle in direct conflict with the decisions of the U. S. Supreme Court. The legal principle of the trial Judge involves the destruction of the Jury Challenge from a practical viewpoint. Direct and specific evidence of a particular act of discrimination is simply not necessary. *Avery v. Georgia*, supra. Even if it was, the action of the trial Judge in refusing to allow the disclosure of the identity of the key men and their examination, would make proof of particular acts of discrimination an utter impossibility. The combination of the legal principle which requires a firm proof which the denial of the Motion to question makes impossible, creates a death trap for the Challenge and its complete destruction as a legal reality. All names come from the unknown key men. It is their choices which are directly material. Just as in *Avery v. Georgia*, supra, where the use of different colored slips makes discrimination more possible, so in this case there are a number of factors which make discrimination more possible for those who want to discriminate. They are (a) the use of persons not under any oath of office for the submission of all the names, (b) complete secrecy as to identity of key persons, (c) complete secrecy and protection from any questioning, (d) the fact that the key persons are answerable to no one at any time or place as to their choices and means of selection.

The legal responsibility resting on the jury commissioners was not assumed by them when they more or less at random selected key men and then accepted only those names which were submitted by the key men. In a concurring opinion in the case of *Cassel v. Texas*, 339 U.S. 282, Justice Clark said in referring to the duty of the jury commissioners: "But it does appear to me from this record that their responsibility is broader than they understand it to be. They frankly stated that in making up the list they discussed only those persons whom they knew personally and that they considered only one negro, a school principal who could not serve. The record indicates clearly that there were negroes qualified and available whom the commissioners did not know but whom upon

inquiry they should have considered. Their responsibility was to learn whether there were persons among the negroes they did not know who were qualified and available for service." The above cited opinion shows that the duties of a jury commissioner under the due process clause are not of an inconsequential nature. Applying the principles of Justice Clark's opinion, it is certain that Mr. Bryars, the clerk, had no idea whatsoever whether any groups were excluded by the key men. "Q. All right, sir. Now whether or not these key men used organizations would be unknown to you in the selection of their list of prospective jurors submitted? A. That is correct. I haven't any idea whatsoever how they proceeded." (R.43). There is no way that the clerk, Mr. Bryars, could possibly offer evidence that there was no discrimination. By his own testimony he could not know. This does not measure up to the duties of the State jury commissioner in Texas under the above reasoning of Justice Clark. There is a constitutional requirement commanding knowledge.

"Jurors in a Federal Court . . . are to be selected by the Clerk of the Court and the jury commissioner. . . . This duty of selection may not be delegated." *Glasser v. U.S.*, 315 U.S. 60.

In the above case, Justice Murphy stated: "But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. *Smith v. Texas*, 311 U.S. 128, 130."

The clerk applied an unconstitutional principle in making deliberate choices. The clerk, Mr. Bryars, explained the method. He and the jury commissioner had approximately 3,000 to 4,000 names. They selected 810 names from that submitted group (R.38).

In so doing, "We do conscientiously endeavor to get a cross-section from the names that have been submitted to us by the key men and from the questionnaires which the prospective jurors have submitted. Q. On the basis of that, what efforts do you make to get a cross-section from the names that have been submitted, from an economic viewpoint? A. We just examine the questionnaire and select them, well, not from every strata I guess, but we do try to broaden it, make it a true reflection of New Mexico." (R.46).

The only pertinent information therein was occupation (R.56). This was apparently a principal basis of choice and then he said we select them from "every strata." What the clerk did was to arrange occupational representation. This is proven because he knew absolutely nothing about the numbers in the various economic groups and did not care about knowing (R.44). It, therefore, must follow that he selected a cross-section by getting representation from nearly every strata. His concept of a cross-section was in the occupations listed in the questionnaires. Representative jury according to their method is one reflecting as many and varied occupational groups as possible and the clerk's method necessarily involved systematic exclusion.

By his own testimony the clerk was seeking a token representation of the various occupations. The constitutional prohibition against discrimination is not satisfied with representation arbitrarily limited to one. *Cassel v. Texas*, supra.

A hand picked jury whereby three out of four names were rejected for the sake of satisfying the claims of various stratas of society is unconstitutional. The method is unconstitutional as being an erroneous interpretation of the term representative.

The issues are clear. The clerk says representative means that nearly all occupational groups shall be represented. Appellant submits that it means truly representative of the people. Appellant asserts it means representative in the sense of the suffrage as we know it. A form of government could exist where people are

divided into economic groups, and vote within the economic group and each economic group then has an equal vote on the actual issue. This idea of representative government may be theoretically acceptable. Actually it is repugnant to our ideas of democracy. The jury selection method is representative in the sense that suffrage is representative. Representation in government through economic groups or stratas is as repugnant to our democracy in jury selection as it is to suffrage. (See Justice Murphy's opinion in *Glasser v. U.S.*, supra.)

The opinion of the Tenth Circuit mentions a circuitous procedure about asking the clerk for the names of the key men, and using a subpoena for the jury commissioner, Albert Mitchell. However, these matters were directly presented to the trial Judge and there was never any question in the trial Court about their proper presentation nor their unqualified disposition by the trial Judge (R.11, 18, 19, 50). Besides there was more involved than identity; there was the question of interrogation by deposition or otherwise, and further, the clerk did not select the key men from Bernalillo County nor know anything about them. This had been done by the other jury commissioner (R.11, 42, 43).

CONCLUSION

It is respectfully submitted that the Petition should be granted.

ROLANDO J. MATTEUCCI
Counsel for Petitioner
604 Simms Building
Albuquerque, New Mexico

EUGENE E. KLECAN
WILLIAM J. BINGHAM
712 Simms Building
Albuquerque, New Mexico
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6405 — September Term, 1960

CHARLES W. PADGETT,

Appellant,

v.

BUXTON-SMITH MERCANTILE COMPANY and FLOYD R. EHRMANN,

Appellees.

Appeal from the United States District Court for the District of New Mexico

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EUGENE E. KLECAN (WILLIAM J. BINGHAM was with him on the brief) *for Appellant.*

JAMES C. RITCHIE (RODEY, DICKASON, SLOAN, AKIN & ROBB was with him on the brief) *for Appellees.*

Before PHILLIPS, LEWIS and BRETTENSTEIN, *Circuit Judges.*

BRETTENSTEIN, *Circuit Judge.*

Filed, United States Court of Appeals, Tenth Circuit, Nov. 2, 1960.

ROBERT S. CARTWRIGHT, *Clerk.*

In this automobile accident case, with jurisdiction resting on diversity, the ground for appeal from the judgment entered upon a jury verdict in favor of the defendants is the denial of appellant-plaintiff's challenge to the jury array because of the alleged exclusion therefrom of persons in the social and economic status of the plaintiff, a manual laborer and wage earner. The challenge is to the array, i.e., the entire group of individuals whose names went into the box from which the names of prospective petit jurors were drawn.[1] The basis for the challenge is that on the panel from which was drawn the jury that heard the case there was no one below the economic status of foreman.

In selecting names to go into the box, the first task is to compile a list of individuals residing in the district who may be available for jury duty. The source of such names varies from district to district. In some federal districts, city or telephone directories, state jury lists, poll books, tax records and other like media are employed. In New Mexico and other districts the procedure is to obtain from key persons located throughout the state lists of individuals whom they suggest for jury service. Commonly, as in New Mexico, questionnaires are then sent to the individuals whose names have been obtained from the source used. These are examined by the clerk of the court and the jury commissioner and an agreed number are selected for inclusion within the group that makes up the box from which the panels are drawn.

Plaintiff does not complain of the manner in which the panel was drawn from the box or of the procedure followed in drawing prospective jurors for his case from the panel. Instead, he first attacks the source of the names used in filling up the box and, second, the selection of names from that source for inclusion in the box.

The clerk of the court testified that in November, 1959, he and the jury commissioner examined between 3,000 and 4,000 ques-

[1] See 28 U.S.C. § 1864.

tionnaires which had been returned by persons whose names had been obtained from key men living at various points in the state. From this total, 810 names were put in the box. A panel of 50 was then drawn from the box for the jury term in which the instant case was tried. The reduction of this number by court granted excuses required two additional drawings of 8 names each to fill out the panel.

In *Windom v. United States*, 10 Cir., 260 F.2d 384, we approved the New Mexico system of the use of key men as a source of the names of individuals to whom questionnaires were sent. While we are asked to re-examine that decision, we decline to do so. Neither statutory nor case-made law requires the use of any particular source of names so long as there is no systematic exclusion of the members of any race, creed, social or economic group. The difficulty with the use of the key man system is that on occasion it arouses attacks such as here made. At the same time problems are presented by the use of other sources. When poll lists are employed, there is an exclusion of those who do not vote. Likewise, the use of the tax rolls eliminates those who pay no taxes and telephone directories leave out those who have no telephones. State jury lists are only as good as the state method of selection. Perhaps the district courts would be wise to utilize a combination of several sources.

The burden of showing the exclusion of a class lies on him who challenges the array.[2] In *Windom v. United States*, supra, we said that a court should not be required to undertake an investigation of a jury panel until it is suspect. The same rule applies to the array.

To sustain his position the plaintiff filed a sworn statement giving his analysis of the occupations of the individuals on the panel and called a statistician who testified from public documents as to the relative proportions of various economic groups in New

[2] *Windom v. United States*, supra, p. 385; *Frazier v. United States*, 335 U.S. 497, 503, rehearing denied 336 U.S. 907.

Mexico. From such showing plaintiff asserts that there was no representation on the panel of his economic group and, hence, the entire array is suspect. The conclusion does not follow. A blind drawing of 66 names from a box containing 810 names not surprisingly may fail to include members of a certain group. Yet this does not detract from the propriety and fairness of the system used. This is not a case like *Avery v. Georgia*, 345 U.S. 559, in which different colored slips were used for the members of two groups.

As we see it, the exclusion of a group by chance selection in the drawing of a panel is no ground for suspicion of the exclusion of that group in the array. Something more must be shown. The stability of the jury system would be imperilled if a litigant could cast doubt upon the legality of the array by a showing that his particular group was not represented or not proportionately represented on the panel from which the petit jury for his case was to be selected.

In the case at bar, plaintiff's counsel made no effort to examine the questionnaires even after such procedure was suggested to them by the trial court. It would seem reasonable that such an examination would have either proved or disproved the existence of grounds of suspicion.[3]

The clerk of the court was examined at length as to the selection of the key men. He selected such men for half of the state and the jury commissioner, Albert K. Mitchell, selected the remainder. The letter of instructions to the key men contained the following:

> "We request your assistance in the preparation of a jury list for this court. We desire the names of men and women residing in your county who would make good jurors, it being our desire to compile a jury list composed of good citizens from the several counties of the State representing a cross-section of the population, fairly apportioned as to sex and as to racial, economic and social groups."

[3] Examination of questionnaires was the procedure followed in *Bary v. United States*, 10 Cir., 248 F.2d 201, 206-207, certiorari denied 359 U.S. 934.

The clerk testified that there was no discrimination and no effort at discrimination in the procedures followed by him and the jury commissioner.

Plaintiff complains of the fact that he did not get the names of the key men. When he had the clerk on the stand he did not ask him the names of the key men whom he, the clerk, had selected. Plaintiff argues that the court erred in refusing to order the attendance of the jury commissioner but such argument is without substance as the record discloses no effort to compel such attendance by the issuance and service of subpoena pursuant to Rule 45, F.R.Civ.P.

The rule requiring a jury to be truly representative of a cross-section of the community and forbidding the systematic or arbitrary exclusion of members of any ethnic, racial, religious, social or economic group[4] does not mean that a banker is entitled to a jury on which another banker sits or that a day laborer have a jury on which a member of his group sits. The petit jury, the panel and the array are not suspect because of the absence of a member of a litigant's group from the trial jury or from the panel out of which the trial jury is selected. In the case at bar, the plaintiff failed to sustain the burden of establishing his challenge to the array and related motions.

Affirmed.

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[4] See *Windom v. United States*, supra, p. 385, and *Bary v. United States*, supra, p. 206, and cases there cited.

JUDGMENT

Thirty-third Day, September Term, Wednesday, November 2nd, 1960.

Before HONORABLE ORIE L. PHILLIPS, HONORABLE DAVID T. LEWIS and HONORABLE JEAN S. BREITENSTEIN, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 644

CHARLES W. PADGETT, *Petitioner,*

v.

BUXTON-SMITH MERCANTILE COMPANY and FLOYD R. EHRMANN, *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM A. SLOAN
Attorney at Law
First National Bank Building
Albuquerque, New Mexico
Attorney for Respondents

JAMES C. RITCHIE and
RODEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Walker v. United States, 93 F. 2d 383 (8th Cir., 1937), cert. den. 303 U.S. 644 (1938) 8
Windom v. United States, 260 F. 2d 384 (10th Cir., 1958) 7

STATUTES:

28 U.S.C. § 1864, 1865 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 644

CHARLES W. PAIGETT, *Petitioner*,

v.

BUXTON-SMITH MERCANTILE COMPANY and FLOYD R. EHRMANN, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondent has no objection to the portions of the Petition entitled "Opinion Below," "Jurisdiction," and "Constitutional" (Pet. 1, 2, 3). The respondent is dissatisfied with the petitioner's "Questions Presented" and "Statement of the Case."

QUESTIONS PRESENTED

The sole question presented by this Petition for Writ of Certiorari is whether this Court will review a case in which the Court of Appeals for the Tenth Circuit affirmed an order of the United States District

Court for the District of New Mexico overruling and denying petitioner's challenge to the jury array where petitioner alleged that those occupying the position of laborers for hourly wages or otherwise engaged in actual manual labor were not properly represented and that the array was not representative of a cross-section of the population of the State of New Mexico from an economic and social viewpoint.

STATEMENT OF THE CASE

Respondents object to petitioner's Statement of the Case in that it is composed in large part of argument and of allegations unsupported by any facts before the trial court. At the hearing upon petitioner's challenge, the trial court received into evidence, without objection, the facts set forth in the challenge and in the supplemental statements (R. 37). The challenge included as an exhibit lists of petit jurors, giving for each his name, address, age, length of time in New Mexico, and occupation. The challenge itself is lengthy, and contained allegations based primarily upon speculation and upon information and belief (R. 5-11). The supplemental statements were similar (R. 16-18). Petitioner's Statement of the Case, however, assumes that the truth of the allegations was admitted (Pet. 7, 8). This was clearly not the trial court's ruling (R. 30, 37). The only evidence before the court was, in addition to the lists of petit jurors, the statistical abstract of employment and income in New Mexico, the testimony of Mr. William D. Bryars, and various documents relating to the selection of the panel. Based upon the evidence presented to the court, a fair statement of facts pertinent to this petition is as follows:

1) On March 10, 1960, petitioner filed a challenge to the jury array, alleging generally that the jury panel did not properly include persons in the position of laborers for hourly wages or otherwise engaged in actual manual labor and was not representative of a cross-section of the population of New Mexico (R. 5-11).

2) Several lists of petit jurors were submitted in support of the challenge (R. 19-26).

3) A hearing on the challenge was held March 14, 1960, at which time petitioner presented in support of his challenge statistics showing that the bulk of the population in New Mexico received an income of less than $10,000 (R. 33-37). Petitioner also introduced the lists of petit jurors and called as a witness Mr. William D. Bryars, Clerk of the Court (R. 37-46).

4) Mr. Bryars testified that, in selecting the jury array, he and the jury commissioner wrote to several so-called key men and women in each county in the state and requested a list of persons eligible to serve as jurors (R. 38). When the lists were submitted, each person named was sent a questionnaire to determine that he was qualified and not exempt from service (R. 38). When the replies to the questionnaires were returned, the clerk and the commissioner attempted to select from them an array fairly opportioned as to race, social and economic groups and sex (R. 39). The names were typed on slips of papers and placed in the jury wheel from which the panel was drawn (R. 39). The letters sent the so-called key persons and the prospective jurors and the orders of the court pertaining to the selection of the jury array were also introduced into evidence (R. 54-59).

5) No further evidence was introduced by petitioner; and the court orally overruled the challenge on March 14, 1960, and entered its order April 28, 1960 (R. 30-31, 49).

ARGUMENT

Point I. There Is No Ground for Review By This Court Since Petitioner Failed to Establish Any Denial of a Constitutional Right

Petitioner is seeking a review of the decision of the United States Court of Appeals for the Tenth Circuit upon the constitutional ground that he has been deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States (Pet. 3). In particular, petitioner has challenged the use by the clerk and the jury commissioner in the District of New Mexico of various unidentified persons in each of the counties of the state as a source for names from which the jury panel was selected (Pet. 9). It is alleged that the machinery for the selection of the jury panel is such that they could, and did, discriminate against persons of a lower economic status (Pet. 12). Petitioner is attempting to bring himself under the rule of such cases as *Smith* v. *Texas*, 311 U.S. 128 (1940); *Thiel* v. *Southern Pacific Company*, 328 U.S. 217 (1946); and *Avery* v. *Georgia*, 345 U.S. 559 (1953).

The difference between those cases in which challenges to the jury array or panel have been upheld and the one here is that in the former there was presented some evidence from which the trial court could find discriminatory practices, while here the allegations of the petitioner were unsupported by any evidence. Although petitioner was afforded a hearing on

his challenge, he failed to show any evidence of economic discrimination. While the challenge did attempt a limited examination of the jurors who made up the panel (R. 5-16), petitioner neglected to make any analysis of the entire jury array or, for that matter, to examine the list of jurors included in the array or the questionnaires submitted by them (R. 52). He rested on the allegations of his challenge; and these, unsupported by evidence, are not sufficient to support the challenge to the jury array. *Glasser* v. *United States*, 315 U.S. 60 (1942).

Virtually identical to this case is *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414 (3d Cir. 1955), cert. den. 350 U.S. 971 (1956), in which the court affirmed the denial by the trial court of plaintiff's challenge to the jury array and to the method of selection. While the court there recognized the importance of a representative jury, it was held that the plaintiff had not produced sufficient evidence to support the challenge. This is in accord with *Thiel* v. *Southern Pacific Company*, *supra*, where the challenge was upheld after testimony from both the clerk and the jury commissioner that there had been an intentional and deliberate exclusion from jury lists of all persons who worked for a daily wage. Any such evidence of discrimination is completely lacking from the record in this case. To the contrary, the testimony of the clerk was that a deliberate attempt was made in selection of the jury array to get a cross-section of New Mexico fairly apportioned as to race, social and economic groups and sex (R. 39). This testimony was unrefuted and no evidence was presented to support petitioner's allegation that there was discrimination.

Petitioner was quite clear in the hearing before the court that the challenge was not directed toward the selection of names from the jury wheel, but to the manner in which the names were placed in the wheel, i.e., to the jury array (R. 47-48). Such analysis as petitioner made of the jury lists, however, went only to the petit jurors (R. 8-27). Even as to these, petitioner conducted a cursory examination. His excuse for lack of preparation was the short interval between the drawing of the petit jury and the notice of trial (Pet. 8). He neglected to mention that the jury array which he was challenging was selected November 10, 1959 (Pl. Ex. 3; R. 58-59). Even if he be correct that there was not sufficient time between the drawing and the notice, he has shown no reason why he could not have examined the array prior to the notice of trial. Furthermore, while the array from which the panel was drawn contained 810 names, only 66 names were drawn for the petit jury (Pl. Ex. 3; R. 58; R. 22-27). Petitioner never attempted to investigate the array except for the 66 petit jurors. Had he done so and made some showing of discrimination, he might have come within the decisions of this Court. Having failed in this, he is in no position to petition this Court for review.

Point II. The System of Jury Selection Used in the District of New Mexico Contains No Inherent Discriminatory Practices Which Should Be Reviewed By This Court

The statutory provisions for the selection of grand and petit jurors in the district courts are general and, by their nature, leave much to the discretion of the clerk and the jury commissioner. Except that the names shall be placed in the jury box without regard to party affiliations and that the jurors shall be selected

from such parts of the district as the court directs so as to be most favorable to an impartial trial, no requirement is made as to the source from which the names of qualified jurors shall be taken. 28 U.S.C. §§ 1864, 1865.

In the present case the clerk and the jury commissioner, in an effort to obtain state wide representation, sought the assistance of persons living in each county of the state. Had they merely sought the required number of names in this manner and placed the names in the jury box without further action they might properly be subject to attack for delegating their duties. This, as the record clearly shows, was not the case. After receiving the names of several thousand prospective jurors, they sent questionnaires to each of them (R. 38). When the questionnaires were returned and examined, approximately 800 names were selected and placed in the jury box (R. 39, 40). This testimony of the clerk, which was not contradicted, established that the selection was not by a "secret, unofficial group" as petitioner argues (Pet. 2).

Petitioner has not presented a case such as *Avery* v. *Georgia*, *supra*, where the mechanics for selection themselves were faulty. Nor has petitioner shown a deliberate attempt on the part of the clerk and the jury commissioner to exclude certain classes from the juries, the practice which was condemned in *Thiel* v. *Southern Pacific Company*, *supra*. The procedure presently used for jury selection in the District of New Mexico was previously approved by the Court of Appeals for the Tenth Circuit in *Windom* v. *United States*, 260 F. 2d 384 (10th Cir., 1958). It is similar to that approved by the Court of Appeals for the Third

Circuit in *Dow* v. *Carnegie-Illinois Steel Corporation*, *supra*, and by the Court of Appeals for the Eighth Circuit in *Walker* v. *United States*, 93 F. 2d 383 (8th Cir., 1937), cert. den. 303 U.S. 644 (1938). Petitioner offers no authorities for the proposition that such method is improper. If, then, the system itself does not contain inherent weaknesses intended to facilitate discrimination, petitioner's argument, if it is to have any validity, must rest upon a showing that the system has been discriminatory as applied. *Smith* v. *Texas*, *supra*. Respondents have discussed above the application of this system, and, we submit, petitioner has failed completely in showing discrimination or exclusion.

Point III. The District Court Did Not Err in Refusing Petitioner's Motion to Interrogate Each Person on the Jury Array and in Refusing to Subpoena the Jury Commissioner

Petitioner makes the additional point that the court improperly refused him permission to interrogate the key men, the jury commissioner and the panel (Pet. 2). This assertion is based on petitioner's claim that the panel was admittedly "suspect" (Pet. 2). Respondents submit these arguments were adequately met in the opinion rendered by the Court of Appeals (Pet. App. 5).

The term "suspect," which petitioner uses, was taken out of context from the remarks made by the court at the hearing of March 14, 1960. The court was discussing petitioner's assertion that the panel was suspect because two members on the jury panel from Valencia County were bankers (R. 48). The court went on to point out that this proved nothing where the petitioner had not attempted to show the popula-

tion of that county or the number of jurors on the array from that county. It is clear from the order entered by the court that it did not consider the panel to be suspect (R. 30, 31).

As for the examination of the panel and the jury commissioner, petitioner is complaining that the court did not do what he could have done for himself. The court stated that it would not issue a subpoena for the jury commissioner unless some showing was made that he had acted improperly in fulfilling his duties (R. 50). As the court of appeals pointed out, the court did not, and could not, have prevented petitioner from bringing in the jury commissioner to testify. So far as the jurors are concerned, the court offered petitioner the opportunity to prepare questions which might be propounded to the jury (R. 49). Also, the questionnaires of all persons included in the jury array were available for examination (R. 52). Petitioner made no effort to avail himself of either opportunity to support his challenge. Since petitioner did not prepare his own case, he is in a poor position to complain that the court did not do this for him.

CONCLUSION

Petitioner has failed to show faults in the system of jury selection used in the District of New Mexico or any discrimination or exclusion on the part of the clerk of the court and the jury commissioner in select-

ing the jury array. Accordingly, the petition should be denied.

Respectfully submitted,

WILLIAM A. SLOAN
Attorney at Law

First National Bank Building
Albuquerque, New Mexico

Attorney for Respondents

JAMES C. RITCHIE and
RODEY, DICKASON, SLOAN, AKIN & ROBB
Albuquerque, New Mexico

Of Counsel